

**THIS INFORMATION IS NOT INTENDED TO PROVIDE LEGAL ASSISTANCE AND SHOULD BE USED AS AN INFORMATIVE TOOL ONLY. LEGAL COUNSEL SHOULD BE SOUGHT FOR ANY QUESTION THAT YOU MAY HAVE.**

## **FORMER SPOUSE PROTECTION ACT**

(Public Law 97-252, Section 1002, 10 U.S.C. 1408)

### **RIGHTS AND BENEFITS OF FORMER SPOUSES OF MILITARY SERVICES MEMBER**

#### **INTRODUCTION**

The FSPA does not mandate an automatic splitting of retired pay and benefits nor does it provide any specific formula. It does not require allocation of pay; it allows it. The FSPA allows judges in state domestic relations courts to view “disposable retired pay” as an investment resulting from the efforts of both the military member and spouse. The judge can consider “disposable retired pay” and benefits to which a former spouse is entitled under the Act, along with other property of the marriage, in making a fair settlement between the parties.

#### **THE STATE COURTS**

For the most part, domestic relations matters are controlled by state law and the rulings of state courts. It is only in those few instances where Congress has enacted a federal law governing some aspect of a divorce that states are obligated to follow federal mandates. As a federal law, the FSPA controls some important aspects of dividing military retirement benefits. Apart from that, almost all of the activities involving divorce, dissolution of marriage, annulment, legal separation, alimony, child support and custody are controlled by state law.

#### **STATE COURT JURISDICTION**

In order for a state court to take any action in a case it must first have “jurisdiction,” which means the power to rule. For the most part, a state court only has jurisdiction over its own residents. Many states have special residency provisions for military members and dependents stationed within the state. A court cannot divide retired pay unless it has jurisdiction over the military member or retiree. A state court will have jurisdiction in a particular case if the member voluntarily takes action to become a legal resident of the state or if the member consents to the jurisdiction of the court. A court may also have jurisdiction to determine part, but not all, of the issues arising in a divorce action. For example, a court may exercise its jurisdiction to terminate the marriage by issuing a divorce decree, but also determine that it does not have jurisdiction over the member’s retirement pay and therefore make no direction for the division of the member’s retirement as part of the property settlement. This is one example of why parties to a divorce should obtain legal advice prior to taking action in a divorce.

## **DIRECT PAYMENTS**

The FSPA also facilitates enforcement of property settlements by allowing former spouses to receive a court-ordered division of retired pay, alimony, and child support directly from the Defense Finance and Accounting Service (DFAS) Centers. To be entitled to direct payments of the property settlement from DFAS, the former spouse's marriage to the military member must have lasted for 10 years or more during the same time the military member served 10 or more years toward retirement. (The 10-year threshold is not a prerequisite for direct payments of alimony or child support). The amount which can be directly paid under the FSPA is generally limited to 50 percent of "disposable retired pay."

### **OTHER FACTORS AFFECTING THE PAYMENT OF BENEFITS FROM DFAS:**

\* Normally, payment will begin within 90 days after "effective service". If the member is not yet entitled to retired pay, payments will normally begin within 90 days after the member is entitled.

\* A court cannot order a service member to apply for retirement in order to initiate payment.

\* Arrearages will not be considered in determining the amount payable from retired pay.

\* An award of retired pay to a spouse or former spouse cannot be sold, assigned, transferred, or otherwise disposed of (including through inheritance) by a spouse or former spouse. [See 10 U.S.C. 1408(c)(2) and 32 C.F.R. Section 63.6(h)(11).]

\* If the member is on active duty at the time of the court order, payments will only be made if the court order (or some other ancillary documents) certifies compliance with the Soldiers' and Sailors' Civil Relief Act. [See 10 U.S.C. 1408(b)(1)(D) and 32 C.F.R. Section 63.6(c)(4).]

\* There are three ways that direct payments terminate: by court order; by death of the former spouse; or by death of the service member.

The FSPA allows state courts to divide "disposable retired pay" as a division of marital property, which is a net amount calculated by taking the entire military retired pay and then subtracting authorized deductions.

As a result of 1990 Amendments to the Act, for divorces finalized on or after 3 February 1991, state and federal income taxes are not authorized deductions in arriving at disposable retired pay.

Tax withholdings will not be deducted prior to computing "disposable retired pay; therefore the division will be based on "before tax" dollars. Taxes will still be withheld, but after the pay has been divided between the retiree and the former spouse. An example would be a \$1000 monthly paycheck would be divided 50/50, with \$500 allotted to the retiree and \$500 to the former spouse. Now, taxes will be withheld from each \$500 payment. The DFAS centers will then send separate Form 1099-R's to the retiree and the former spouse, showing for each the amount of retired pay received and amounts withheld for taxes.

## **PROCEDURE TO EFFECT SERVICE**

Once a court order divides the retired pay, the order needs to be properly served upon the member's finance center to be implemented. A signed application submitted to DFAS by the spouse/former spouse or attorney is required to effect the apportionment of a service member's pay for child support or alimony. DFAS will not honor orders:

1. Which are not explicit as to what is being awarded (e.g., division of retired pay, alimony, child support;
2. Conditional awards which contain the word "if"; or
3. Awards, which provide for fixed costs with cost of living adjustments or for offsets against the amount to be paid.

### **DD Form 2293 contains the required information, including the following:**

- a. The full name and address, and social security number of the applicant.
- b. The service member's full name, social security number and branch of service.
- c. A written statement certifying that no modification to the court order has been effected, and no appeal will be taken by the applicant.
- d. A written statement that any future overpayments are recoverable and subject to involuntary collection from the applicant or his or her estate.
- e. A written statement that the applicant will notify DFAS if the court order upon which payment is based is vacated, modified or set aside. (This includes notice of remarriages if all or part of the payment is for alimony or notice of a change in eligibility for child support payments by reason of the death, emancipation, adoption, or attainment of majority of a child whose support is provided through direct payments from retired pay.)

### **In addition, the following must be submitted:**

1. A certified copy of the court order which awards an apportionment of the retired pay to a spouse or former spouse, (as well as a certified copy of the divorce decree if not the same order.) Orders must be certified by the issuing court within 90 days of their receipt by DFAS.
2. If the member was on active duty when the court orders were entered, the court order or other documents must show compliance with the SSCRA.
3. Proof of the date of marriage (unless it is shown in the court order).
4. The order must provide for payment of: (a) an amount expressed in dollars; (b) an amount expressed as a percentage or fraction of disposable retired/retainer pay; or (c) if the parties were divorced while the soldier was still on active duty, either an amount to be derived from a formula,

or a hypothetical retired pay amount, as set forth below. (Methods (a) and (b) are also available to parties divorced while the soldier was still on active duty.)

In order for DFAS to accept a formula, the missing element must be either the soldier's years of service or the total retirement points earned by a reservist. The formula would be stated as follows:

(a) Active duty personnel:

Length of time marriage

50% x overlaps with military service x 100 = Spouse's percentage

Length of military service

Length of time marriage

50% x overlaps with military service x 100 = Spouse's percentage

Length of military service at

separation or divorce

Spouse's percentage using 1st formula x retired pay for rank held at

time of separation or divorce = Spouse percentage

Actual retired pay

The first formula is considered the standard formula. The second is often best for the military member, and the third is often best for the nonmilitary spouse.

If the disposable retired pay is determined by a formula, and/or stated as a precise dollar amount or percentage, then it is also possible to arrange direct payment of up to 50% of disposable retired pay to the former spouse. The 50% limit does not apply to how much disposable retired pay may be awarded by a court, but only applies to how much may be paid directly via direct deposit. Direct payment is only possible if 10 years of the active duty service time overlaps with 10 years of the marriage. This is known as the "10/10/10" rule.

(b) Reserve Personnel:

Total # of Retirement Points

50% x earned during marriage x 100 = Spouse's percentage

Total # or Retirement Points earned during Military Service

Documents must be served by personal service, or by registered or certified mail, to the following address. Note that DFAS-CL is the only designated agent within DoD for receipt of court orders involving FSPA payments against members and retirees from these branches of the service. Service upon any other DoD organization will not be effective.

DFAS-CL/(Code LF) P.O. BOX 998002 CLEVELAND, OH 44199-8002

## **THE SURVIVOR BENEFIT PLAN**

The 1986 Department of Defense Authorization Act (PL 99-145), effective March 1, 1986, changed the basic structure of the Survivor Benefit Plan (SBP). A military member retiring after March 1, 1986 will be enrolled automatically in the SBP with full coverage of his spouse as beneficiary unless both the member and the spouse agree in writing to elect less than full coverage or coverage for a child only. Under the previous system, the spouse was notified of the member's decision but the spouse's consent was not required. If at the time of retirement the member has no spouse, he or she may elect coverage for a child or for another person in the insurable interest category. The member and spouse together may elect less than the gross retired pay as the "base amount" upon which payments and benefits will be calculated. The minimum base amount that may be selected is \$300.

The beneficiary will receive 55% of the base amount until age 62; after age 62, the amount will drop to 35% of the base amount selected. There will be no social security offset as there was in the previous system. Those who were enrolled in the plan before March 1, 1986, are grandfathered into the older system. When the member dies, the beneficiary will receive payments under the new system or the old social security offset, whichever is most advantageous. Benefits will be discontinued if the survivor remarries before age 55. However, if the second marriage ends because of death or divorce, payments to the survivor will be resumed.

When a retiree who has already enrolled in the SBP (with a spouse as beneficiary) is divorced, he or she is obligated to notify the appropriate Finance Center. Coverage for the former spouse will cease and any payments made since the divorce will be refunded. If the divorced retiree dies without having remarried, no one will receive the benefits. If he remarries, the new spouse will be covered automatically after one year of marriage.

However, at the time of the divorce, the retiree may elect to continue coverage for his former spouse (or former spouse and minor child/children) if the spouse was a beneficiary prior to the divorce. An active duty member may agree at the time of divorce to name his ex-spouse as beneficiary of the SBP when he retires. If election is voluntary on the part of the member of retiree, there must be a written, notarized agreement signed by both the member and the spouse and it should be incorporated into the divorce decree and property settlement. The decision can be revoked only by a new court order. For active duty or retired members, application for the reinstatement of a former spouse must be made to the appropriate Finance Center within one year of the date of divorce.

A court can require a military member or retiree to elect the SBP for a former spouse or for both a former spouse and child. A court can also require a retired military member who has SBP spouse coverage to convert that coverage to former spouse coverage upon divorce. The former

spouse should ensure the court ordered election is made by filing with DFAS a request within one year of the date of the divorce.

## **MILITARY BENEFITS AFTER DIVORCE**

1. Spouses: Entitlement to medical care and other privileges for former spouses is based upon:

- the duration of the marriage,
- the number of years in service, and
- the number of years that the marriage overlaps with service.

In addition, all former spouses lose eligibility to medical care, both CHAMPUS and through Military Medical Treatment facilities (MTF's), if they are enrolled in an employer-sponsored health plan, regardless of age. However, at age 65, former spouses only lose eligibility to CHAMPUS if they become eligible for Medicare, Part A. They do remain entitled to an ID card reflecting eligibility for medical care in MTF's.

Maximum "20/20/20" benefits are available to an unremarried former spouse of a member (or former member):

- who was married to that member for a least 20 years,
- whose spouse performed at least 20 years of creditable service in determining eligibility to retired pay,
- with 20 years of marriage overlapping 20 years of creditable service.

"20/20/20" benefits are medical care in both civilian and military facilities, and commissary, theater and exchange privileges.

Limited "20/20/15" benefits are available to an unremarried former spouse of a member (or former member):

- who was married to that member for at least 20 years,
- whose spouse performed at least 20 years of creditable service in determining eligibility to retired pay,
- and who had at least 15 years of marriage overlapping the 20 years of creditable service.

"20/20/15" benefits are medical care in civilian and military facilities (but not commissary, theater or exchange privileges).

Generally, an unremarried spouse is fully covered for medical care for one year, with an option to participate in a group insurance plan with limited coverage for one additional year. There is no coverage after 2 years.

2. Children: (natural or adopted) continue to be entitled to military identification cards and certain military benefits after the divorce. Step-children (of the member) will not be entitled to benefits after the divorce.

a. medical care: unmarried children under age 21 continue to be entitled to medical care in both civilian and MTF's. Unmarried children over 21, if enrolled full-time in an accredited institution of higher learning, remain eligible to receive medical care until graduation or age 23, whichever is earlier. Also, the sponsor must be providing over 50 percent of the child's support. The entitlements for incapacitated children are handled under special rules.

b. Delta Dental care: same as above, if elected by the sponsor.

c. Commissary: children residing in the household of a separated spouse continue to be eligible for commissary privileges until the divorce is final. Once the divorce is final, children residing in the spouse of a former spouse who is not authorized commissary privileges are not considered to be members of the authorized sponsor's household for purposes of commissary privileges, even if the sponsor provides or maintains the household.

d. Exchange and Theater: children continue to be entitled to use the exchange and theater if they are dependent on the sponsor for over 50 percent of their support.

For further information concerning procedures for obtaining identification cards, contact the Customer Service Element in the Military Personnel Flight at the nearest military installation.